IN THE

JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1967

No. ~~1377~~ 148

LOUIS EUGENE SUDDUTH,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari Directed to the Supreme Court of the State of California

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PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE CHIEF JUSTICE EARL WARREN AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Comes now Louis Eugene Sudduth and petitions this Court for a writ of certiorari directed to the Supreme Court of the State of California to review and reverse a judgment affirming the petitioner's conviction of misdemeanor driving while intoxicated.

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1257(3), U. S. Codes, and by an order of extension of Justice

Douglas extending the time to file the petition for certiorari.

The decision of the Supreme Court of California was rendered December 23, 1966. A petition for rehearing was duly filed and denied on January 20, 1967. Application was duly made for extension of time to the Honorable Justice Douglas and said time was extended to and including May 10, 1967.

OPINION BELOW

The decision of the Supreme Court of California is reported in 65 A.C. 585, 55 Cal.Rptr. 393, and a copy thereof is set forth herein in Appendix A.

The previous decision of the District Court of Appeal is reported in 243 A.C.A. 563, 52 Cal.Rptr. 527.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment, United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment, United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment, United States Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 1, Section 13, California Constitution:

§ 13. Criminal cases; speedy and public trial; process for witnesses; appearance and defense; counsel; double jeopardy; self-incrimination; due process; failure to explain or deny; depositions

Sec. 13. In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No

person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury. The Legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide when there is reason to believe that the witness, from inability or other cause, will not attend at the trial. (Amended Nov. 6, 1934.)

Section 23102, Vehicle Code of California:

§ 23102. Misdemeanor drunk driving

(a) It is unlawful for any person who is under the influence of intoxicating liquor, or under the combined influence of intoxicating liquor and any drug, to drive a vehicle upon any highway. Any person convicted under this section shall be punished upon a first conviction by imprisonment in the county jail for not less than 30 days nor more than six months or by fine of not less than two hundred fifty dollars ($250) nor more than five hundred dollars ($500) or by both such fine and imprisonment and upon a second or any subsequent conviction, within seven years of a prior conviction, by imprisonment in the county jail for not less than five days nor more than one year and by a fine of not less than two hundred fifty dollars ($250) nor more than one thousand dollars ($1,000). A conviction under this section shall be

deemed a second conviction if the person has previously been convicted of a violation of Section 23101 of this code.

(b) If any person is convicted of a second or subsequent offense under this section within seven years of a prior conviction and is granted probation, it must be a condition of probation that such person be confined in jail for at least five days but not more than one year and pay a fine of at least two hundred fifty dollars ($250) but not more than one thousand dollars ($1,000).

(c) If the person convicted under this section is under the age of 21 years and the vehicle used in any such violation is registered to such person, the vehicle may be impounded at the owner's expense for not less than one day nor more than 30 days.

THE FACTS

The basic facts are that petitioner was arrested on March 17, 1965 at approximately 2:10 in the morning (R.T. 6) at Devonshire and Havenhurst Streets in Los Angeles County by Officer E. O. Wilson. The vehicle was eastbound on Devonshire and made a right hand turn. The officer had observed the car in response to a call and pulled the driver over to the curb.

At that time petitioner got out of the car and approached the police vehicle. The officer testified that he noticed petitioner was very unsteady on his feet. (R.T. 10) He observed him walking and it appeared to the officer that he was walking unsteadily; instead of placing his feet directly in front of one another, he was more or less to the side and not in line. He approached petitioner

and asked for his operator's license. Petitioner fumbled in his wallet approximately 30 seconds. (R.T. 10)

He then proceeded to inform petitioner of his rights, his right to counsel, his right to remain silent and also that anything he said could be used against him in subsequent proceedings. (R.T. 11)

The officer then stated he was going to explain and demonstrate and administer what he called a Field Sobriety Examination, a series of tests to determine the sobriety of a party. At that time he attempted to demonstrate the walk the line test, during which time petitioner kept up a running line of conversation with the officer's partner and he had to interrupt him several times to get his attention to the examination he was attempting to demonstrate. (R.T. 10) The answer of petitioner was "I'm not going to take your test." He repeated he was not going to take the test and the officer kept demonstrating the walk the line test, at which time petitioner said he refused to take any tests.

The officer then asked him a series of questions as to whether he was injured or sick or whether he was diabetic or took insulin or whether he had any physical defects, all of which questions he declined to answer. (R.T. 13) The officer asked him what time it was and he again refused to answer. All of this proceeding was testified to before the jury. He was also asked when he last slept, which he refused to answer; how many hours sleep he had, which he declined to answer. (R.T. 15-16) The officer wrote down the questions and his failure to answer. (R.T. 16)

Then they proceeded to the station, at which time the Breathalizer examination was assembled, explained and petitioner at this time refused this examination. (R.T. 16) A Breathalizer is a mechanical device designed to analyze and chart the amount of alcohol in a person's breath and to compare this in percentage to blood alcohol. It has not been accepted by the State of California, nor any state, as scientifically accurate nor as a determination of proof of driving while under the influence of intoxicating liquor. The test is administered in the absence of any attorney or representative of a defendant and the product of the test itself is not subject to re-examination or cross-examination.

The prosecutor said petitioner's refusal to take the Breathalizer test was proof of his guilt. (R.T. 70) The evidence of petitioner's refusal also to take tests was commented on in the prosecutor's argument to the jury and the jury was instructed as follows on the significance of such evidence:

> "YOU ARE INSTRUCTED that in a case where a defendant is accused of violating Section 23102 of the Vehicle Code it is permissible to prove that the defendant was offered a Breathalizer test or other sobriety test after he or she has been aware of the nature of the test and its effect. The fact that such test is refused under such circumstances is not sufficient standing alone and by itself to establish the guilt of a defendant but is a fact which if proven may be considered by you in the light of all other proven facts in deciding the question of guilt or innocence. Whether or not such conduct shows a consciousness of guilt and the significance to be

attached to such a circumstance are matters for your determination." (Pet. for Hearing, p. 17)

The Supreme Court of California affirmed the judgment holding it a suspension of no constitutional right to refuse a test designed to produce physical evidence in the form of a Breathalizer sample, regardless of whether counsel is present, and that a refusal to cooperate with law enforcement officers does not qualify for the protection of the Fifth and Fourteenth Amendments.

This counsel raised the constitutional issues of violation of the Fifth and Fourteenth Amendments U.S. Constitution before the District Court of Appeal, Second Appellate District, State of California, where he first appeared in the case. That court overruled his objections and affirmed the judgment. (243 A.C.A. 563, 52 Cal. Rptr. 527) The violation of the Fifth and Fourteenth Amendments were raised again in the Supreme Court of California and denied by that court.

QUESTIONS PRESENTED

1. Whether the Fifth and Fourteenth Amendments to the Constitution of the United States, as applied to the states in *Griffin v. California,* 380 U.S. 609, 14 L.ed.2d 106, and *Malloy v. Hogan,* 378 U.S. 1, 12 L.ed.2d 653, apply to one arrested for alleged drunk driving in violation of Section 23102 of the Vehicle Code of California.

2. Whether one can be compelled, upon being arrested for violation of the Vehicle Code, to take a Breathalizer test regardless of whether counsel is present or not and whether his refusal to take such a test may be intro-

duced in evidence and commented on before the jury to bring about a defendant's conviction and whether such procedure and proceeding does not violate the Fifth and Fourteenth Amendments to the Constitution of the United States.

3. Whether testimony regarding the refusal to take a test as outlined by police officers, in the absence of counsel, and testimony regarding refusal to collaborate with police to bring about one's own conviction of crime violates the Fifth and Fourteenth Amendments to the Constitution of the United States.

4. Whether the giving of a so-called Breathalizer test, where the product is not available for examination and cross-examination by the defendant and his counsel, denies the right of confrontation as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

5. Whether a test which is not approved by a state legislature as being scientifically complete and accurate may be offered and used by police officers as a basis for developing evidence against an accused and forming the basis of his conviction.

6. Whether the court erred in its instruction to the jury regarding the refusal to take the so-called Breathalizer test and whether such instruction that a jury may consider such refusal to arrive at its verdict offended the Fifth and Fourteenth Amendments to the Constitution of the United States.

REASONS FOR GRANTING THE WRIT

The question presented here is one of great importance in the administration of criminal law and is another one of the series of cases in which California has sought to circumvent this Court's decision on the subject of self-incrimination guaranteed by the Fifth and Fourteenth Amendments U.S. Constitution.

The California court in *People v. Sudduth* said:

> "Suspects have no constitutional right to refuse a test designed to produce physical evidence in the form of a breath sample whether or not counsel is present."

This Court has said, in *Malloy v. Hogan*, 378 U.S. 1, 12 L.ed.2d 653:

"The marked shift to the federal standard in state cases began with Lisenba v California, 314 US 219, 86 L ed 166, 62 S Ct 280, where the Court spoke of the accused's 'free choice to admit, to deny, or to refuse to answer.' Id., at 241, 86 L ed at 182. See Ashcraft v Tennessee, 322 US 143, 88 L ed 1192, 64 S Ct 921; Malinski v New York, 324 US 401, 89 L ed 1029, 65 S Ct 781; Spano v New York, 360 US 315, 3 L ed 2d 1265, 79 S Ct 1202; Lynumn v Illinois, 372 US 528, 9 L ed 2d 922, 83 S Ct 917; Haynes v Washington, 373 US 503, 10 L ed 2d 513, 83 S Ct 1336. The shift reflects recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay. Rogers v Richmond, 365 US 534, 541, 5 L ed 2d 760, 766, 81 S Ct 735. Governments, state and federal, are thus constitutionally com-

pelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth. Since the Fourteenth Amendment prohibits the States from inducing a person to confess through 'sympathy falsely aroused,' Spano v New York, supra, 360 US at 323, 3 L ed 2d at 1272, or other like inducement far short of 'compulsion by torture,' Haynes v Washington, supra, it follows a fortiori that it also forbids the States to resort to imprisonment, as here, to compel him to answer questions that might incriminate him. The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement — the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty, as held in Twining, for such silence.

"This conclusion is fortified by our recent decision in Mapp v Ohio, 367 US 643, 6 L ed 2d 1081, 81 S Ct 1684, 84 ALR2d 933, overruling Wolf v Colorado, 338 US 25, 93 L ed 1782, 69 S Ct 1359, which had held 'that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure,' 338 US, at 33, 93 L ed at 1788. Mapp held that the Fifth Amendment privilege against self-incrimination implemented the Fourth Amendment in such cases, and that the two guarantees of personal security conjoined in the Fourteenth Amendment to make the exclusionary rule obligatory upon the States. We relied upon the great case of Boyd v United States, 116 US 616, 29 L ed 746, 6 S Ct 524, decided in 1886, which, considering the Fourth and Fifth Amendments as running 'almost into each

other,' id., at 630, 29 L ed at 751, held that 'Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of [those Amendments]. . . .'"

The Supreme Court of California assumes that the Breathalizer test is scientifically accurate and complete. There has been no such holding or finding by the State of California and various courts have held that the Breathalizer test is subject to several errors.

In *State v. Baker*, 56 Wash.2d 846, 355 P.2d 806, the Court reversed a Breathalizer conviction for lack of foundation to show prima facie the following requirements that must be introduced by the prosecution before the Breathalizer test evidence is admissible:

1. That the machine was properly checked and in proper working order at the time of conducting the test.

2. That the chemicals employed were of the correct kind and compounded in the proper proportion.

3. That the subject had nothing in his mouth at the time of the test and that he had taken no food or drink within 15 minutes prior to the test.

4. That the test was given by a qualified operator and in the proper manner.

In California, no such requirement was shown to have been had nor was it shown that even with such requirement that the test would be accurate.

The California court misconceived this Court's interpretation of *Boyd v. United States,* 116 US 616, 29 L.ed. 746, *Malloy v. Hogan,* 378 US 1, 12 L.ed.2d 653, *Griffin v. California,* 380 US 609, 14 L.ed.2d 106, and *Murphy v. Waterfront Commission of New York,* 378 US 52, 12 L.ed.2d 678.

This Court in *Boyd* said:

> "... but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used to convict him of crime or to forfeit his goods is within the condemnation of [those Amendments]."

We can conceive of nothing more violative of extorting a man's own testimony than to line him up immediately after his arrest, advise him that he doesn't have to say anything and that anything he might say could be used against him and then to demonstrate a so-called Field Sobriety Test, which he refuses to take, ask him several questions, which he refuses to answer, ask him to take a machine test of unknown results or capacity, by unknown and probably inexperienced police operators, without any chance to have counsel present or cross-examine the result, and then use the advice that the officer gave that he didn't have to do any of those things and the fact that he followed that advice and didn't, as evidence that could be used to convict him.

If the officer's conduct in trying to force the petitioner to make statements, to take a Field Test and to take a Breathalizer test, is not inquisitorial, then we do not know the correct definition of the word. We respectfully submit that it certainly was not accusatorial, as set out in

Malloy v. Hogan, supra, and that suspension under our American system of government to have a constitutional right to take a test or any test which requires their collaboration with officers in bringing about their own conviction.

We pray that this Court grant certiorari and reverse the judgment below.

Respectfully submitted,
MORRIS LAVINE
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